IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID ERROL KING,	
Appellant,	
v.	NO. 23645
UNITED STATES OF AMERICA,	
Appellee.	

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FILED

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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TOPICAL INDEX

TABLE OF AUTHORITIES

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging appellant David Errol King to be guilty of both counts of the indictment following a non-jury trial [C.T. 22].[1]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21,

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[1] "C.T." refers to Clerk's Transcript.

United States Code, Section 174. Jurisdiction of this court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in both counts of the two-count indictment returned by the Federal Grand Jury for the Southern District of California at San Diego, California, on July 19, 1967 [C.T. 2-3].

Count One of the indictment alleged that on or about June 14, 1967, in San Diego County, appellant knowingly imported and brought approximately one and three-fourths ounces of heroin, a narcotic drug, into the United States from Mexico, contrary to Title 21, United States Code, Section 173 [C.T. 2].

Count Two of the indictment alleged that on or about June 14, 1967, in San Diego County, appellant knowingly concealed, and facilitated the transportation and concealment of, approximately one and three-fourths ounces of heroin, a narcotic drug, which, as the defendant then and there well knew, had been imported and brought into the United States contrary to law [C.T. 3].

Non-jury trial of appellant before the Honorable Gus J. Solomon, United States District Judge, resulted in a guilty verdict as to both counts on November 30, 1967 [C.T. 22].

On the same date, appellant was committed to the custody of the Attorney General for a period of six years on each of Counts One and Two to run concurrently [C.T. 21].

Notice of appeal was filed on December 13, 1967 [C.T. 25] (thirteen days later). This on its face does not appear timely.

III

ERROR SPECIFIED

To paraphrase what appears to be appellant's point on the error specified, the sentencing Judge (who was also the trial Judge) utilized hearsay of government counsel and Customs Inspector Ellis in the sentencing of the appellant.

Appellant also apparently complains of sentence without a presentence report. Appellant apparently feels such a procedure resulted in a deprivation of due process, prejudicial to defendant in that defendant was sentenced to two terms of six years concurrent, rather than the minimum five-year terms required by Section 21, United States Code, Section 174.

STATEMENT OF FACTS

Since no issue of guilt is raised by defendant [A.B. 1, 3],[2] the pertinent facts revolve around the sentencing phase of the lower court procedure.

In essence, Government counsel and the Customs Agent presented their opinions of appellant's conduct and criminal activities to the sentencing Judge. The entire procedure was in open court while appellant and his counsel were present.

Attention is directed to the record of the statements of defense and Government counsel, the appellant, Customs Agent Ellis, and the Honorable Judge Solomon [R.T. 76-92].[3] The Judge was obviously seeking information by which he could more completely formulate an opinion of the nature of appellant and his background. This process used by the Court was an attempt by the Court to deal fairly with the appellant by augmenting the information about the appellant received during the course of the trial.

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[2] "A.B." refers to Appellant's Brief.

[3] "R.T." refers to Reporter's Transcript.

V

ARGUMENT

A. THERE WAS NO PREJUDICIAL ERROR COMMITTED BY THE DISTRICT COURT IN SENTENCING APPELLANT.

The lower court ordered no presentence report because defense counsel stated to the court that defendant was ready for sentence at that time (immediately after trial and a finding of guilty) [R.T. 90-91]. Therefore, no one had an opportunity to prepare a presentence report. Had such a report been prepared it would undoubtedly have contained unsworn hearsay statements. The inclusion of such statements would not have given rise to constitutional issues. Rule 32(c)(2), Federal Rules of Criminal Procedure. Since all information, hearsay or otherwise, could have been in a presentence report, the error (if any) was not error solely because the statements were made in open court where defendant and his counsel had an opportunity to rebut. It is interesting to note that defendant waived a presentence report (via waiving any delay in the sentencing of defendant), after which the statements, to which he now objects, were made. If appellant wished to present further rebuttal to those statements he could have delayed sentencing.

Assuming there had been a presentence report, the Assistant United States Attorney and Customs Agent Ellis could have given their opinions to the officer preparing the

report. The judge could have then refused to disclose the contents of the report to the defendant. Baker v. United States, 388 F.2d 931 (C.A. 4, 1968); United States v. Weiner, 376 F.2d 42 (C.A. 3, 1967). Had this been the case, however unlikely, in view of Judge Solomon's attempt to be scrupulously fair, it is clear appellant would have been worse off than he is. Yet no constitutional bar to such a procedure exists. It is difficult to find the "gross unfairness" claimed of in the procedure used by the court.

The District Court was not required to order a presentence report. Roddy v. United States, 296 F.2d 9 (C.A. 10, 1961), Rule 32(c), Federal Rules of Criminal Procedure.

The defendant was found guilty of two crimes, each of which carries a minimum punishment of five years and a maximum punishment of twenty years (Title 21, United States Code, Section 174). These terms could have run consecutively for an overall sentence of forty years. Gore v. United States, 357 U.S. 386 (1958). Appellant was sentenced to six years on each count to run concurrently, only one year more than the minimum permissible sentence. Not only was such a sentence permissible, under the circumstances it was lenient in view of the quantity and high quality of the narcotics involved. The Government respectfully submits that this court has the duty to affirm the

sentence. Cf. Russell v. United States, 288 F.2d 52 (C.A. 9, 1961), cert. denied, 371 U.S. 926.

B. SOLICITING OPINIONS OF COUNSEL, BOTH DEFENSE AND GOVERNMENT, WAS NOT ERROR BY THE DISTRICT COURT.

The court may inquire as to the Government's opinion of the case for purposes of sentencing defendants. Noell v. United States, 183 F.2d 334 (C.A. 9, 1950). The judge is allowed wide discretion in the gathering of information for sentencing. William v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L. Ed. 1337 (1949); United States v. Doyle, 348 F.2d 715 (C.A. 2, 1965), cert. denied, 382 U.S. 843; United States v. Fischer, 381 F.2d 509 (C.A. 2, 1967), cert. denied, 390 U.S. 973.

The one Federal case cited by appellant, United States v. Foster, 9 F.R.D. 367, is not on point nor is it relevant. That case did not deal with the sentencing process.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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